

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOOP AI LABS INC,
Plaintiff,

v.

ANNA GATTI, et al.,
Defendants.

Case No. [15-cv-00798-HSG](#) (DMR)

**ORDER DENYING PLAINTIFF'S
MOTION FOR SANCTIONS**

Re: Dkt. No. 731

Plaintiff Loop AI Labs Inc. filed a motion for sanctions against Defendants Almaviva S.p.A. and Almawave S.r.l. (together, the “Italian Almawave Defendants”). [Docket No. 731.] Plaintiff seeks sanctions against the Italian Almawave Defendants pursuant to Federal Rule of Civil Procedure 16(f) based on their purported failure to engage in fact discovery in violation of the scheduling orders issued by the Honorable Haywood S. Gilliam. The Italian Almawave Defendants and Defendant Almawave USA, Inc. (“Almawave USA”) oppose the motion. [Docket No. 773.] The court held a hearing on October 31, 2016. For the following reasons, Plaintiff’s motion is denied.

I. FACTUAL BACKGROUND

On February 20, 2015, Plaintiff filed this action against the Italian Almawave Defendants and Almawave USA, Inc. (together, the “Almawave Defendants”), as well as Anna Gatti, IQSystem LLC, and IQSystem, Inc. It filed the first amended complaint on April 6, 2015. [Docket No. 45.] On April 23, 2015, the Italian Almawave Defendants moved to dismiss the first amended complaint for lack of personal jurisdiction. [Docket No. 62.]

On May 26, 2015, while the jurisdictional motion to dismiss was pending, Judge Gilliam conducted an initial case management conference at which he set a January 29, 2016 deadline for the completion of fact discovery. [Docket Nos. 100 (Minute Order), 105 (Scheduling Order).]

1 Despite the pending motion to dismiss, the court did not stay any party's discovery obligations.

2 In August 2015, Plaintiff served its first set of written discovery on the Italian Almaxwave
3 Defendants. This set included interrogatories and requests for production ("RFPs"). [Docket No.
4 731-1 (Healy Decl., June 15, 2016) Exs. A, F (discovery responses showing Aug. 17, 2015 service
5 date).]¹

6 On September 2, 2015, Judge Gilliam denied the Italian Almaxwave Defendants' motion to
7 dismiss without prejudice and ordered jurisdictional discovery. [Docket No. 183.] In so ruling,
8 Judge Gilliam held that the outcome of the motion turned on whether Plaintiff's claims against the
9 Italian Almaxwave Defendants "arise out of" those defendants' forum-related activities. Judge
10 Gilliam therefore allowed Plaintiff to take jurisdictional discovery directly related to the merits of
11 the case, namely, to test whether the Italian Almaxwave Defendants had participated in the scheme
12 alleged in the first amended complaint. *Id.* Judge Gilliam ordered the parties to meet and confer
13 on the "appropriate scope and length of the jurisdictional discovery period, taking into account any
14 discovery completed during the pendency of th[e] motion [to dismiss]" and to submit a stipulation
15 and proposed order. *Id.* at 6. If the parties were unable to reach agreement, the court directed
16 them to submit their dispute to the undersigned for resolution. *Id.*

17 On September 16, 2015, the Italian Almaxwave Defendants each responded to the twelve
18 interrogatories in Plaintiff's first set of written discovery with the following objection:

19 [Almaxviva S.p.A./Almaxwave S.r.l.] objects to this
20 [interrogatory/request] and does not provide a response on the
21 grounds that the Court has not yet determined that it has personal
22 jurisdiction over [Almaxviva S.p.A./Almaxwave S.r.l.]; obligating
23 [Almaxviva S.p.A./Almaxwave S.r.l.] to participate in discovery
before personal jurisdiction is determined violates Constitutional
requirements of due process. The Court has ordered that only
limited jurisdictional discovery may proceed; which discovery has
not yet been approved by stipulation or Court order.

24 On the same date, the Italian Almaxwave Defendants each provided the same objection in response

25
26 ¹ In its sanctions motion, Plaintiff describes its March 3, 2015 service of interrogatories and RFPs
27 on the Italian Almaxwave Defendants in connection with its request for expedited discovery.
28 Plaintiff asserts that the Italian Almaxwave Defendants ignored these requests. Pl.'s Mot. at 7.
Notably, Plaintiff fails to mention that Judge Gilliam denied Plaintiff's request for expedited
discovery on March 12, 2015. These discovery requests are therefore irrelevant to the instant
motion. [Docket No. 32.]

1 to each of Plaintiff's 108 RFPs. Healy Decl., June 15, 2016, Exs. A (Almaviva S.p.A.'s
2 responses), F (Almawave S.r.l.'s responses).

3 Plaintiff served a second set of written discovery on the Italian Almawave Defendants on
4 September 15, 2015. Healy Decl. Exs. B, G (discovery responses showing Sept. 15, 2015 service
5 date). On October 15, 2015, while the jurisdictional discovery dispute remained pending, the
6 Italian Almawave Defendants each responded to the 19 RFPs in Plaintiff's second set of written
7 discovery with virtually the same objection set forth above. Healy Decl. Exs. B (Almaviva
8 S.p.A.'s responses), G (Almawave S.r.l.'s responses).

9 Later in October 2015, Plaintiff located Valeria Sandei and Raniero Romagnoli, two
10 officers of Almawave S.r.l., in San Diego, California and personally served them with subpoenas
11 duces tecum and ad testificandum, requesting 109 categories of documents. Healy Decl. Ex. T;
12 Culp Decl., June 29, 2016, Exs. C, D. The subpoenas sought compliance in San Diego on
13 December 14 and 15, 2015. *Id.* Sandei and Romagnoli served objections to the subpoenas on
14 November 2, 2015, including the objection that each subpoena "improperly compels compliance
15 further than 100 miles from where Responding Party resides, is employed, or regularly transacts
16 business in person." Healy Decl. Exs. V, W. Plaintiff asserts that neither witness appeared or
17 produced documents in response to the subpoenas. Healy Decl. ¶¶ 31, 33, 34.

18 Plaintiff and the Italian Almawave Defendants were unable to reach an agreement on
19 jurisdictional discovery and filed a joint letter brief describing their disputes on September 23,
20 2015. [Docket No. 211.] The undersigned scheduled a discovery hearing for October 30, 2015.
21 [Docket No. 266]. The hearing was continued to December 10, 2015 at Plaintiff's request.
22 [Docket Nos. 270, 273].

23 On December 10, 2015, the undersigned conducted a three-hour hearing on the parties'
24 jurisdictional as well as other discovery disputes. The parties expressed their agreement that the
25 jurisdictional discovery was inextricably intertwined with the merits of Plaintiff's claims.
26 [Docket No. 335 (Dec. 10, 2015 Hr'g Tr.) at 4, 34, 36.] The court set deadlines for jurisdictional
27 discovery to be completed by January 15, 2016, but held that depositions could be conducted
28 beyond the deadline per the parties' stipulation. The court permitted Plaintiff to serve five

jurisdiction-related interrogatories to each of the Almaxwave Defendants, and also ordered that Plaintiff could take 28 hours of jurisdiction-related depositions. [Docket No. 323.]

The court also addressed the Almaxwave Defendants' document production at the December 10, 2015 hearing. According to defense counsel, Plaintiff had asked the Italian Almaxwave Defendants to respond to 108 previously-propounded RFPs as part of jurisdictional discovery. Hr'g Tr. at 19. Defense counsel asserted that the Almaxwave Defendants were producing responsive documents in three "volumes," and that the first volume had been produced in mid-November 2015. *Id.* at 18. He stated that in order to preserve the Italian Almaxwave Defendants' jurisdictional objections, the document production came "under the auspices of [Almaxwave] U.S.A.," but represented to the court that there was "no distinction [between the Almaxwave Defendants]. We are not withholding documents from the Italians. So U.S.A. is making the production on behalf of everyone." *Id.* at 20.² The court ordered Almaxwave USA to produce Volumes II and III of the Almaxwave Defendants' document production by December 18, 2015 and December 31, 2015, respectively. [Docket No. 323.]

The Almaxwave Defendants produced witnesses Valeria Sandei, Raniero Romagnoli, Luca Ferri, Mariantonietta Perri, and Angela Nicoletta for depositions during the week of January 19, 2016. Culp Decl. ¶ 9. Plaintiff did not depose all of these witnesses. *Id.* The Italian Almaxwave Defendants also each responded to five jurisdictional interrogatories. *Id.* at ¶ 7. The final jurisdictional deposition was conducted February 3, 2016. [See Docket No. 398 (Order granting stipulation to continue G. DiNapoli's deposition to Feb. 3, 2016).]

On February 2, 2016, Judge Gilliam held a second case management conference and continued the fact discovery deadline to March 29, 2016. [Docket No. 413 (Minute Order), 411 (Second Scheduling Order).]

² Defendants articulated this approach once again in a February 18, 2016 letter to Plaintiff, which states: "As we have previously informed you, there are no documents that [the Italian Almaxwave Defendants] would produce that Almaxwave USA... has not already undertaken to produce. In other words, even though the Italian Almaxwave Defendants object – and have objected – to participating in discovery in this case on the basis that the Court lacks jurisdiction over them, their jurisdictional objections have not deprived Loop of receiving the Italian Almaxwave Defendants' responsive documents (to the extent any such responsive documents exist)." [Docket No. 907-3].

Following the close of jurisdictional discovery, Plaintiff served three additional sets of written discovery on the Italian Almaxwave Defendants. On February 25, 2016, in response to Plaintiff's third set of written discovery, the Italian Almaxwave Defendants each responded to Plaintiff's new 7 RFPs with the following objection:

[Almaxviva S.p.A./Almaxwave S.r.l.] objects to this request on the grounds that the Court has not yet determined that it has personal jurisdiction over [Almaxviva S.p.A./Almaxwave S.r.l.]; obligating [Almaxviva S.p.A./Almaxwave S.r.l.] to participate in discovery beyond the targeted and limited personal jurisdiction discovery that was ordered violates Constitutional requirements of due process. The Court has ordered that only limited jurisdictional discovery may proceed; which has concluded as of February 3, 2016.

Healy Decl. Exs. C (Almaxviva S.p.A.'s responses), H (Almaxwave S.r.l.'s responses).

On March 10, 2016, the Italian Almaxwave Defendants moved to dismiss Plaintiff's second amended complaint for lack of personal jurisdiction. [Docket No. 469.] On March 28, 2016, the Italian Almaxwave Defendants each responded to Plaintiff's fourth and fifth sets of written discovery with virtually the same objection and response they provided in response to the third set of discovery, above.³ Healy Decl. Exs. D (Almaxviva S.p.A.'s responses to fourth set), E (Almaxviva S.p.A.'s responses to fifth set), I (Almaxwave S.r.l.'s responses to fourth set), J (Almaxwave S.r.l.'s responses to fifth set).

On June 8, 2016, Judge Gilliam denied the Italian Almaxwave Defendants' motion to dismiss Plaintiff's second amended complaint for lack of personal jurisdiction. [Docket No. 726.]

II. DISCUSSION

A. Rule 16 Sanctions

Plaintiff moves for sanctions pursuant to Federal Rule of Civil Procedure 16, asserting that the Italian Almaxwave Defendants violated the court's scheduling orders by refusing to engage in fact discovery. Rule 16 authorizes a court to "issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f)(1)(C). Rule 37(b)(2)(A) authorizes a variety of sanctions, including

³ Plaintiff's fourth set of written discovery included 109 new RFPs and five interrogatories. Its fifth set of written discovery included 17 new RFPs. Healy Decl. Exs. D, E, I, J.

1 “prohibiting the disobedient party from supporting or opposing designated claims or defenses, or
2 from introducing designated matters in evidence.” Fed. R. Civ. P. 37(b)(2)(A)(ii). Plaintiff
3 asserts that the preclusion sanction authorized by Rule 37(b)(2)(A)(ii) is appropriate to address the
4 Italian Almarwave Defendants’ refusal to allow Plaintiff “to obtain any fact discovery in violation
5 of the Rule 16 Scheduling Order, which required them to engage in and allow fact discovery and
6 to complete all such fact discovery by March 29, 2016.” Mot. at 13. It asks the court to preclude
7 the introduction by any defendant of testimonial evidence by any officers or employees of the
8 Italian Almarwave Defendants, preclude the Italian Almarwave Defendants’ introduction of any
9 documentary evidence at summary judgment or trial, preclude the Almarwave Defendants from
10 introducing any expert testimony, and preclude the Almarwave Defendants from using “evidence
11 obtained by Almarwave USA Inc. or any other Defendant during the course of fact discovery in
12 which the Italian Almarwave Defendants refused to engage.” *Id.* at 16-17. Plaintiff’s motion rests
13 primarily on the Italian Almarwave Defendants’ refusal to provide substantive responses to
14 Plaintiff’s first through fifth sets of written discovery, described above.

15 The Italian Almarwave Defendants dispute Plaintiff’s assertion that they did not engage in
16 fact discovery. Notwithstanding their jurisdictional objections to Plaintiff’s first through fifth sets
17 of discovery, they assert that by the March 29, 2016 close of fact discovery, they had “timely
18 responded to all requests for production served on them,” and produced more than 54,000 pages of
19 documents in response to 261 document requests propounded to Almarwave S.p.A., 264 document
20 requests propounded to Almarwave S.r.l., and 263 document requests propounded to Almarwave
21 USA. Culp Decl. ¶ 8. Defense counsel asserts that the vast majority of the documents were
22 obtained from the Italian Almarwave Defendants. *Id.* The Italian Almarwave Defendants further
23 contend that they “timely responded” to an additional 17 interrogatories beyond the five
24 jurisdictional interrogatories ordered by the court. Culp Decl. ¶ 7.

25 At the hearing, defense counsel conceded that the Italian Almarwave Defendants had not
26 provided substantive responses to Plaintiff’s first through fifth sets of discovery, but represented
27 that this was because the Italian Almarwave Defendants were concerned that responding to
28

Plaintiff's discovery could be construed as a waiver of their jurisdictional challenge.⁴ [Docket No. 946 (Oct. 31, 2016 Hr'g Tr.) at 9-10, 11.] Therefore, the Italian Almaxwave Defendants responded to Plaintiff's discovery under the auspices of Almaxwave USA. Defense counsel further represented that as to Plaintiff's RFPs, the Italian Almaxwave Defendants "did not have any objections over and above those of Almaxwave USA." *Id.* at 13. In other words, according to defense counsel, the Italian Almaxwave Defendants did not withhold any responsive documents due to an objection that was not also asserted on behalf of Almaxwave USA. *See id.* at 14. Counsel noted at the hearing that Valeria Sandei, an officer of the Almaxwave Defendants, had stated the same in a declaration signed under penalty of perjury. In that declaration, Sandei, who is the President of Almaxwave USA, CEO of Almaxwave S.r.l., and Strategic Marketing Officer for the Almaxwave Defendants, states that "for purposes of [the Almaxwave Defendants'] collection and production of documents" in discovery, the individuals collecting documents "made no distinction between which Almaxwave entity or person 'controlled' the document and assumed that any document within the possession, custody or control of the Italian Almaxwave Defendants was also in the possession, custody or control of Almaxwave USA." [Docket No. 907-4 (Sandeil Decl., Oct. 11, 2016, ¶¶ 1, 3.] She states that "no distinction was made between the three Almaxwave entities for purposes of document collection, review, or production," and that "[t]he Italian Almaxwave Defendants' documents were included in the documents produced by Almaxwave USA." *Id.* at ¶¶ 3, 4.

As to the 17 interrogatories propounded to the Italian Almaxwave Defendants (in addition to the five court-ordered jurisdictional interrogatories), Sandei states that Plaintiff propounded nearly identical interrogatories on Almaxwave USA, and that the "substantive responses that Loop received from Almaxwave USA were virtually the same—if not exactly the same—as the responses that the Italian Almaxwave Defendants would have provided but for their then-pending objections to jurisdiction." *Id.* at ¶ 5; *see also* Culp Decl. ¶ 7. Sandei states that "[i]n sum, Almaxwave has

⁴ Defense counsel stated, "[s]imply by submitting written responses the concern was that we would—more than a concern. We were told we would face an argument that that was a waiver of their jurisdiction challenge." Oct. 31, 2016 Hr'g Tr. at 9. Plaintiff did not refute this assertion.

1 not withheld any information or documents on the basis that such documents or information was
2 in the possession, custody, and control of, or known only by the Italian Almaxwave Defendants and
3 not Almaxwave USA.” Sandei Decl. ¶ 6. Additionally, defense counsel represented at the hearing
4 that in responding to Plaintiff’s RFPs and interrogatories, the Almaxwave Defendants drew no
5 distinction between jurisdictional discovery and merits discovery. Oct. 31, 2016 Hr’g Tr. at 15-
6 16.

7 At the hearing, Plaintiff argued that defense counsel’s representations are inconsistent with
8 the positions that Almaxwave USA took in discovery. Oct. 31, 2016 Hr’g Tr. at 41-42.
9 Specifically, Plaintiff points to Almaxwave USA’s general objections to Plaintiff’s first set of
10 discovery, in which it wrote, “Almaxwave USA objects to each of the interrogatories and requests
11 to the extent they seek documents and information not in Almaxwave USA’s possession, custody,
12 or control,” and “Almaxwave USA objects to the instructions to the extent they require the
13 production of documents and information not in Almaxwave USA’s possession, custody, or
14 control.” [Docket No. 897-12 at 3-4.] Plaintiff is technically correct on this point. However, as
15 discussed above, defense counsel explained that the Italian Almaxwave Defendants made the
16 objections on paper in order to avoid Plaintiff’s threatened argument that they waived
17 jurisdictional objections by responding to discovery. From a practical standpoint, the Italian
18 Almaxwave Defendants responded to the discovery requests through Almaxwave USA. To support
19 this statement, the Almaxwave Defendants submitted a declaration in which Sandei states under
20 oath that the individuals gathering responsive documents “assumed that any document within the
21 possession, custody or control of the Italian Almaxwave Defendants was also in the possession,
22 custody or control of Almaxwave USA.” Sandei Decl. ¶ 3.

23 At the hearing, defense counsel admitted that the Italian Almaxwave Defendants did not
24 subsequently amend their discovery responses after the court denied their motion to dismiss
25 Plaintiff’s second amended complaint for lack of personal jurisdiction on June 8, 2016, which was
26 several months after the close of discovery. Oct. 31, 2016 Hr’g Tr. at 18, 20. The Italian
27 Almaxwave Defendants should have promptly served amended responses once their jurisdictional
28 challenge was finally adjudicated. However, having reviewed defense counsel’s representations at

the October 31, 2016 hearing, Sandei's declaration, and counsel's declaration in opposition to Plaintiff's motion for sanctions, the court finds that the Italian Almaxwave Defendants did not "refuse to engage in and allow fact discovery" in violation of any court orders. Rule 16 sanctions are therefore inappropriate. In order to clarify the record, the Italian Almaxwave Defendants shall promptly amend their discovery responses to comport with their representations.

B. Alleged Deficiencies in the Almaxwave Defendants' Document Productions

Plaintiff's motion for sanctions also challenges the sufficiency of Almaxwave USA's document production. It describes several categories of documents that it contends were never produced. Mot. at 3, Reply at 3-4. For example, Plaintiff contends that Almaxwave USA did not produce evidence of internal deliberations regarding the decision to hire Gatti, or confidentiality agreements between Gatti and the Almaxwave Defendants. Mot. at 3. The Almaxwave Defendants object that this portion of Plaintiff's motion is an untimely motion to compel, a characterization with which the court agrees.⁵ Fact discovery closed on March 29, 2016. The deadline to file a motion to compel has long passed, and Plaintiff had ample opportunity during discovery to challenge Almaxwave USA's responses to discovery. However, as detailed below, Plaintiff repeatedly and inexplicably failed to comply with the court's orders and procedures governing motions to compel discovery.

This case was referred to the undersigned for discovery on June 16, 2015. [Docket No. 113.] The court's June 18, 2015 Notice of Reference and Order re Discovery Procedures set forth the procedure by which the parties could seek resolution of discovery disputes. [Docket No. 117; *see also* Docket No. 401 (Jan. 27, 2016 Notice of Amended Discovery Procedures).] That order, which incorporates portions of the undersigned's Standing Order, provides that in lieu of filing formal discovery motions, the parties shall meet and confer in person or by telephone and then file a joint letter addressing remaining disputes. It also provides that "[i]n the rare instance that a joint letter is not possible, each side may submit a letter not to exceed three pages, which shall include

⁵ At the hearing, defense counsel asserted that the documents described by Plaintiff either do not exist or were in fact produced by the Almaxwave Defendants. Oct. 31, 2016 Hr'g Tr. at 20-22.

1 an explanation of why a joint letter was not possible.” *Id.* at 2. On July 24, 2015, following a
2 discovery management conference, the court ordered the parties to audio-record all in-person or
3 telephonic meet and confer communications and maintain logs of such communications. The
4 court also prohibited the parties from filing ex parte (i.e., unilateral rather than joint) discovery
5 letters without the court’s leave. [Docket No. 156.]

6 Notwithstanding the court’s order, the parties filed a number of ex parte discovery letters
7 and responses thereto without permission in September 2015. [*See, e.g.*, Docket Nos. 192, 205,
8 213, 216, 217, 219, 220, 221.] On September 28, 2015, the court issued an order expressing its
9 “disapproval of the parties’ dismal record regarding their meet and confer efforts,” and stated that
10 it would no longer consider any ex parte discovery letter filed without prior approval. [Docket No.
11 222.] Going forward, the court directed the parties to seek leave to file ex parte discovery letters
12 by filing a one-page motion for administrative relief pursuant to Civil Local Rule 7-11, warning
13 the parties that the court would only grant leave to file an ex parte letter “in exceptional
14 circumstances.” *Id.*

15 After the court issued these directives, all of the parties, including Plaintiff, made attempts
16 to seek relief related to discovery disputes by filing administrative motions for leave to file ex
17 parte discovery letters. For example, on October 7, 2015, Plaintiff filed an administrative motion
18 for leave to file motions to compel discovery as to all Defendants. In its administrative motion,
19 Plaintiff blatantly admitted that it had not complied with the court’s joint discovery letter
20 procedure, cavalierly asserting that “there is no reason to believe that any meet and confer would
21 be productive.” [Docket No. 247.] On October 16, 2015, the court issued an order denying
22 Plaintiff’s administrative motion as well as five other administrative motions for leave to file ex
23 parte discovery letters filed by Defendants Almax USA, Gatti, and IQSystem LLC. The court
24 found that the parties had failed to show “exceptional circumstances,” i.e., the moving parties had
25 failed to show that despite their efforts, their opposing party had refused to meet and confer and/or
26 participate in the court’s mandatory joint letter procedure.⁶ [Docket No. 271.] The court

27
28 ⁶ The court also denied a joint letter filed by Plaintiff and Gatti/IQSystem LLC on the ground that
it was “joint” in name only, since the parties never met and conferred about the issues therein, and

1 reiterated its expectation that the parties would “engage in meaningful meet and confer sessions
2 aimed at resolving most if not all discovery disputes without court intervention,” and expressed
3 concern about the parties’ “failure to actually engage in the necessary work of sorting through the
4 substantive issues and attempting to reach appropriate compromises.” *Id.*

5 As discussed above, the court held a hearing and made rulings regarding the scope of
6 jurisdictional discovery in December 2015. On January 11, 2016, one week before jurisdictional
7 depositions were scheduled to begin, Plaintiff filed an “administrative motion to compel
8 jurisdictional discovery” from the Almawave Defendants in which it described purported
9 problems with their interrogatory responses and document production. [Docket No. 369.] The
10 court ruled on Plaintiff’s administrative motion the following day, January 12, 2016. [Docket No.
11 374.] Noting that “it appears there are issues with the jurisdictional discovery on both sides that
12 require further discussion by the parties,” and describing several examples, the court ordered the
13 parties to meet and confer on the issues raised in Plaintiff’s motion on an expedited schedule and
14 file a joint letter regarding any remaining disputes by January 14, 2016, and denied Plaintiff’s
15 administrative motion without prejudice. [Docket No. 374.] Following its receipt of the parties’
16 joint letter (Docket No. 379), the court granted Plaintiff leave “to file a regularly-noticed motion
17 addressing only those issues raised in the joint letter.” [Docket No. 382.] Inexplicably, Plaintiff
18 never filed a motion in compliance with this order.

19 In March and April 2016, Plaintiff made a number of further attempts to obtain court
20 intervention with respect to discovery, most of which were denied for failure to comply with the
21 court’s procedures. On March 7, 2016, without first seeking leave to file an ex parte letter,
22 Plaintiff filed a unilateral discovery letter brief seeking to compel the continuation of the
23 depositions of Sandei, Romagnoli, and Perri, and to take Ferri’s deposition. [Docket No. 448.]
24 Although Plaintiff referred in its letter to its “attempts to schedule” the depositions, it did not
25 describe any efforts to meet and confer with the Almawave Defendants or to submit a joint letter
26 on the dispute. The court denied the motion on March 9, 2016 on the ground that there was no

27
28 denied a motion by Plaintiff for leave to file a motion for contempt as to a third party (Docket No.
265) for failure to show exceptional circumstances.

1 indication in the letter that Plaintiff attempted to comply with the court's Standing Order regarding
2 resolution of discovery disputes. [Docket No. 455.] On March 11, 2016, Plaintiff filed an
3 administrative motion for leave to file a motion to compel the depositions of Sandei, Romagnoli,
4 Perri, and Ferri, representing that the Almaxwave Defendants had refused to participate in a joint
5 letter on the issue. [Docket No. 474.] The Almaxwave Defendants filed an opposition in which
6 they contradicted Plaintiff's representations of their willingness to participate in joint letter.
7 [Docket No. 480.] On March 21, 2016, the court denied the motion on the ground that Plaintiff
8 had not demonstrated "exceptional circumstances" to file an ex parte discovery letter. [Docket
9 No. 501.]

10 On March 30, 2016, after the close of fact discovery, Plaintiff filed an administrative
11 motion for leave to file unilateral discovery letter briefs to compel document productions from the
12 Almaxwave Defendants (and others) and depositions from "the Italian Almaxviva Defendants."
13 [Docket No. 542.] In its motion, Plaintiff asserted that each of the Defendants had refused to join
14 in Plaintiff's discovery letters. *Id.* Finding that Plaintiff had shown exceptional circumstances,
15 the court granted Plaintiff leave to file an ex parte discovery letter as to its motion to compel
16 further depositions. [Docket No. 582.] On April 8, 2016, Plaintiff filed an ex parte discovery
17 letter in which it moved to compel the depositions of Sandei, Romagnoli, Perri, and Ferri.
18 [Docket No. 591.] However, despite Plaintiff's claim that the Almaxwave Defendants refused to
19 produce the witnesses for deposition, correspondence between the parties showed that the
20 Almaxwave Defendants had in fact asked Plaintiff to propose dates for the depositions and offered
21 specific dates for the depositions before the close of fact discovery. [Docket No. 599.]
22 Accordingly, on May 6, 2016, the court denied Plaintiff's motion to compel. [Docket No. 647.]

23 In its March 30, 2016 administrative motion, Plaintiff also sought leave to file a unilateral
24 discovery letter to address the Italian Almaxwave Defendants' and Almaxwave USA's document
25 production. The court denied Plaintiff's motion as to the Italian Almaxwave Defendants on the
26 basis that Plaintiff had not shown exceptional circumstances because it never sought to engage
27 those parties in the joint letter process. [Docket No. 582.] As to Almaxwave USA, it presented
28 evidence that it had in fact responded to Plaintiff's attempts to submit a joint letter, including

providing its portion of a joint letter, contrary to Plaintiff's representations. [Docket No. 560.] Accordingly, the court ordered Plaintiff to submit a statement explaining why Almax USA's actions did not constitute an attempt to participate in the joint letter process. [Docket No. 582.] In its statement, Plaintiff conceded that Almax USA had provided Plaintiff with its portion of a joint letter. While admitting that it had "inadvertently miss[ed]" the correspondence, Plaintiff blamed its mistake on "the overwhelming amount of correspondence Defendants send daily." [Docket No. 590.] The court subsequently denied Plaintiff's request to file a motion to compel with respect to its dispute with Almax USA, finding that Plaintiff had failed to show exceptional circumstances. [Docket No. 612.]⁷

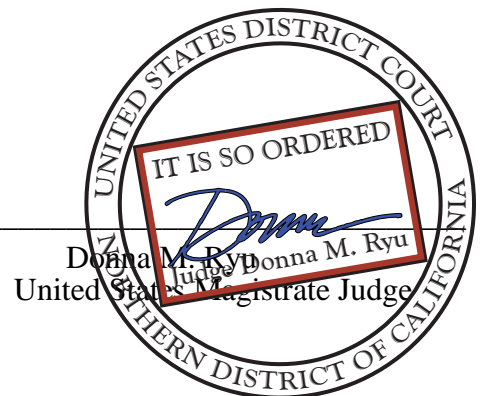
In sum, the record is replete with examples of Plaintiff's unwillingness or inability to comply with court-ordered procedures regarding discovery dispute resolution, and in particular, the requirement that the parties meet and confer in good faith before seeking court intervention. Fact discovery is long over. In light of its repeated failures to comply with the court's Standing Order and timely move to compel, Plaintiff may not belatedly challenge the sufficiency of the Almax Defendants' discovery responses or seek sanctions based on the same alleged deficiencies.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for Rule 16 sanctions is denied. However, the Italian Almax Defendants shall serve amended discovery responses within two weeks of the date of this order that comport with the representations that they have made to Plaintiff and the court.

IT IS SO ORDERED.

Dated: December 27, 2016



⁷ The court notes that although many of Plaintiff's requests to file ex parte discovery letters were denied for failure to demonstrate exceptional circumstances warranting such an approach, nothing prevented Plaintiff from complying with the rules and filing joint discovery letters addressing its disputes. Plaintiff failed to do so.